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No. 91-304

Supreme Court, U.S.

FILED

SEP 25 1991

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In The
Supreme Court of the United States
October Term, 1991

LLOYD GRAMLING, CHIEF OF POLICE
FOR THE CITY OF OKLAHOMA CITY,

Cross-Petitioner

v.

RAYMON J. MELTON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO CROSS PETITION
FILED BY LLOYD GRAMLING, CHIEF OF POLICE
FOR THE CITY OF OKLAHOMA CITY

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QUESTIONS PRESENTED

1. Did cross petitioner preserve the question concerning a property interest in plaintiff's retired status?
2. Does cross petitioner assert any basis for granting certiorari on this issue of plaintiff's property interest in plaintiff's retired status?

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City, a municipal corporation; Lloyd A. Gramling, Chief of Police for the City of Oklahoma City; Gerald L. Emmett, Assistant Chief of Police for the City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith, Lieutenant, Oklahoma City Police Department; Robert Taylor, Lieutenant, Oklahoma City Police Department; David McBride, Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to the City Manager, Defendants

Oklahoma Municipal League, Inc. *amicus curiae*¹

¹ The corporations noted are public corporations with no known subsidiaries of which petitioner is aware.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	5
THE CROSS PETITIONER FAILED TO PRESERVE THE ISSUE CONCERNING PLAINTIFF'S PROP- ERTY INTEREST IN HIS RETIREMENT STATUS ...	5
CROSS PETITIONER DOES NOT STATE AN ADE- QUATE BASIS FOR GRANTING THE WRIT	6
A. Property Interest in Retirement Status	6
B. Good Faith Immunity	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASE:

<i>Board of Regents of State College v. Roth</i> , 408 U.S. 564 (1972)	6
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OTHER AUTHORITIES:

Fourteenth Amendment to the Constitution of the United States	2
28 U.S.C. Sec. 1254(1)	2
42 U.S.C. Sec. 1983	3

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Respondent herein, Raymon J. Melton², respectfully prays that the court deny the cross petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

² Petitioner in Case No. 91-29, and respondent in case nos. 91-280, 91-281, 91-304.

OPINIONS BELOW

The en banc opinion of the Tenth Circuit is reported at 928 F.2d 920³. This decision was entered after an order granting a hearing en banc on four (4) specific issues. This order is reported at 888 F.2d 724, and is set out at App. pp. 50-52. The panel decision of the Tenth Circuit is reported at 879 F.2d 706 as *Melton v. City of Oklahoma City*, and is set out at App. pp. 53-136.

JURISDICTION

The decision of the Tenth Circuit was entered on March 1991. This court granted an extension to file the instant petition for writ of certiorari until July 2, 1991, on which date the petition was filed. The respondent filed its cross petition for writ of certiorari on August 5, 1991. The corrected petition was received by the petitioners on August 26, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

This case involves the provisions of the 14th Amendment to the Constitution of the United States. The 14th Amendment provides as follows:

³ A copy of this opinion is included at App. 1 of Petitioner's Appendix to the petition in Case No. 91-29. Hereinafter, reference to the appendix to Case No. 91-29 shall be referred to as App. ____.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These provisions are implemented by 42 U.S.C. Sec. 1983 which provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

As noted above, the cross-petitioner's application for a writ of certiorari is one of four pending cases. The factual background to this case is clearly set forth in the petition for certiorari filed by Raymon J. Melton in Case No. 91-29.

However, for purposes of this petition, it is important to note several additional facts. At the time of his discharge, R.J. Melton, plaintiff below, had almost 21 years of exemplary service. His service had, in fact, lead to the city's highest award for bravery. Because of his years of service, Melton was eligible for retirement even though

he had been terminated. Further, under state law, Melton had the right to retain his status as a police officer⁴. In addition, Melton could, subject to approval by the Chief of Police retain the right to bear firearms. Further, under the Oklahoma City Police Department operations Manual⁵, Melton was entitled to retain his badge.

On September 23, 1983, after his discharge, cross petitioner sent Melton a letter stating:

This letter is to inform you of your status as a retired officer from this Department.

Due to your unmeritorious retirement you do not retain the privilege or approval to bear firearms or *otherwise represent yourself as a commissioned officer of the Oklahoma City Police Department, as provided in State Law . . .*

Cross petitioner testified that he was aware that retired officers often worked second jobs in uniform. Gramling testified that if Melton was not permitted to wear a uniform on duty that he should not be permitted to wear

⁴ Under 11 Okl. Stat. Sec. 50-125, set forth at page 4 of cross petitioners brief, a retired member "may retain their status as peace officers of the State of Oklahoma, retired, and as such may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement.

⁵ Section 5.05 provides:

All sworn personnel retiring with twenty years of service may retain the police badge which is in their possession at the time of retirement. Sworn personnel retiring with less than twenty years of service may retain their badge at the discretion of the Chief of Police.

a uniform off duty. As a result of this letter, Melton was denied the opportunity to obtain other employment.

At the time of trial, the jury was specifically instructed that Melton had a property interest in his retirement status. Cross petitioner neither objected to that instruction nor provided any alternative instruction on this matter. Indeed, on appeal, the cross petitioner did not assert as a basis for their own appeal that Melton did not enjoy a property interest in his retirement status.

As a result, the Tenth Circuit, at footnote 18, ruled "the City did not challenge the trial court's finding that Mr. Melton had a property interest in his status as a retired police officer. We do not disturb that finding on appeal".

REASONS FOR DENYING THE WRIT

THE CROSS PETITIONER FAILED TO PRESERVE THE ISSUE CONCERNING PLAINTIFF'S PROPERTY INTEREST IN HIS RETIREMENT STATUS

The cross petitioner makes two arguments. First, that plaintiff did not enjoy a property interest in his retirement status. Second, that cross petitioner was entitled to good faith immunity.

As a threshold matter, the undersigned would note that neither matter was raised by the cross petitioner below. That is, prior to this court, the cross petitioner had not disputed the well established existence of that right.

The undersigned would respectfully submit that inasmuch as cross petitioner did not preserve this issue below, this court should not issue the extraordinary writ.

CROSS PETITIONER DOES NOT STATE AN ADEQUATE BASIS FOR GRANTING THE WRIT

A. Property Interest in Retirement Status

Cross petitioner's assertion of a conflict with the decisions of this court is unsupported. That is, they can point to no law or case authority which supports their assertion that an individual does not enjoy a property right in the emoluments of his retirement status.

Indeed, cross petitioners cite as their authority *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The suggestion appears to be that the evidence did not show that the Plaintiff was entitled to his retirement status⁶. The undersigned would simply submit that *Roth*, specifically recognized that it was sufficient if the individual had a legitimate claim to entitlement. The court need not determine whether he was, in fact, entitled to the benefit. Thus, as explained in *Roth*:

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly*, supra, had a claim of entitlement to welfare payments that was grounded in the statute

⁶ Contrary to this assertion, the undersigned would submit that the evidence showed that Raymon J. Melton was the *only* police officer ever denied the right to wear his uniform and carry his badge. This denial prevented him from obtaining outside employment as a security guard.

defining eligibility for them. The recipients had not yet shown that they were in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

In this case, the statute cited provides Raymon Melton with a claim of entitlement. The due process hearing was to allow him to attempt to establish his right. As the Tenth Circuit noted, that is exactly what cross petitioner failed to allow.

Accordingly, the undersigned would submit that the cross petitioner has failed to state a basis upon which a writ of certiorari should be granted.

B. Good Faith Immunity

Cross petitioner's argument regarding good faith immunity is the same as that presented to the court below. To this argument, the court below responded:

Chief Gramling argues that he relied in good faith on the advice of municipal counsel in sending his letter to Mr. Melton, and, therefore, he should be absolved of any personal liability for the consequences of his actions. While superficially attractive, this argument proves too much. Adopting the proffered position would immunize officials from liability via the simple expedient of consulting counsel. In *Harlow*, the Supreme Court sought to protect officials in the good faith exercise of discretion in areas of the law which are not clearly charted. However, where the law is clearly established, there is no

justification for excusing individuals from liability for their actions. In sum, officials are presumed to know and abide by clearly established law. When their actions are otherwise, their claims of qualified immunity will fail.

We conclude that Chief Gramling knew or should have known that under Oklahoma statute Mr. Melton had a property interest in his status as a retired police officer. According to the statute, it was clearly within the discretion of municipal officials to approve or deny Mr. Melton the right to "keep and bear firearms." However, the Chief's letter was designed to, and actually did, reach beyond permissible limits by forbidding Mr. Melton from representing himself in any way as a retired member of the Oklahoma City police force. Chief Gramling deprived Mr. Melton of this property interest without notice or an opportunity to respond. We hold that in so doing, Chief Gramling violated clearly established law and cannot claim the protection of qualified immunity.

(App. pp. 105-106).

In the cross petition, it is argued that the discretion afforded the Chief of Police created a circumstance which would justify the application of qualified immunity. As noted above, the Tenth Circuit addressed that issue. That is, they found that the acts of Chief Gramling went beyond the discretionary denial of right to carry a gun. His actions effectively deprived Melton of the ability to represent himself as a retired police officer. This action was clearly contrary to the language of the statute, and there was no discretion. Accordingly, to the extent the

Chief of Police deprived Melton of that status without due process of law, he is clearly individually liable.

CONCLUSION

Based on the foregoing, the undersigned would respectfully submit that the cross petition for certiorari in this case should be denied.

Respectfully submitted,

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